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# Proposed Legislation Concerning a Lawyer's Duty of Confidentiality

Roger C. Cramton\*

## I. BACKGROUND OF AND NEED FOR LEGISLATION

### A. *California's Professional Duty of Confidentiality*

The law governing lawyering in California contains no provision dealing with an attorney's professional duty of confidentiality, other than one sentence of the Lawyer's Oath. Business and Professions Code section 6068(e) states: "It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."<sup>1</sup> California is the only state without a professional rule governing lawyers' professional duties of confidentiality.<sup>2</sup> California law relating to lawyer confidentiality is sparse and confusing. Current law also appears to maintain the irresponsible position that *no* situations arise in which some other interest outweighs the important public interest in assuring that clients have a high degree of confidentiality in information relating to the lawyer-client representation.<sup>3</sup> This Article proposes legislation to remedy this void. Confidentiality

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1. CAL. BUS. & PROF. CODE § 6068(e) (West Supp. 1995).

2. See ATTORNEYS' LIABILITY ASSURANCE SOCIETY, STATE-BY-STATE ANALYSIS OF ETHICS RULES ON CLIENT CONFIDENCES (Feb. 1994), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1995 SELECTED STANDARDS OF PROFESSIONAL RESPONSIBILITY 132-40 app. A [hereinafter ALAS] (citing a professional rule governing the duty of confidentiality for every state except California).

3. See generally Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367 (1995). The article states, among other things: "California's approach to confidentiality ostensibly is the strictest in the United States." *Id.* at 372. "[California's] bar organizations have been more interested in preserving attorney-client relationships [than in recognizing exceptions to confidentiality that would further

ality in the lawyer-client relationship is of vital importance, but must have limits and exceptions. California's statutory attorney-client privilege recognizes sound exceptions applicable to communications made by a client to a lawyer for purposes of legal advice.<sup>4</sup> The California Legislature should also state exceptions to the confidentiality rule concerning even less confidential information, often not even from the client, that a lawyer acquires in the course of representation.

Because section 6068(e) has no stated exceptions, it has given rise to an attitude within the legal profession that confidentiality of client information is an absolute requirement, totally lacking in any exceptions.<sup>5</sup> A few California decisions recognize implied exceptions,<sup>6</sup> but the general posture of California law provides no explicit permission or obligation for a lawyer to disclose confidential client information in the following situations, not to mention others:

1. Threatened Death or Substantial Bodily Injury

*A lawyer learns from a client that the client is holding a young woman in a confined space with food and water sufficient to last only a few weeks. Or, an angry and violent client storms out of his lawyer's office, armed with a weapon, after making convincing statements that he is going to kill his spouse.*

Eleven states require a lawyer, when the lawyer reasonably believes that a threat is, or is likely to become, a reality, to disclose the client's intention to commit a crime likely to result in death or bodily injury; thirty-nine other jurisdictions permit the lawyer to disclose.<sup>7</sup> Only Cali-

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truthful outcomes in judicial proceedings and protect the interests of third persons]. They have taken a broad and rigid view of confidentiality's scope." *Id.* at 370. Further, legislative amendment of § 6068(e) is desirable because "[t]he status quo inevitably puts predictable and meaningful lawyer-client relationships at risk." *Id.* at 405.

4. CAL. EVID. CODE §§ 956-962 (West Supp. 1995).

5. See Zacharias, *supra* note 3, at 370 (noting the "broad and rigid view of confidentiality's scope" lawyers have taken).

6. See, e.g., *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164, 1188-89, 876 P.2d 487, 502-04, 32 Cal. Rptr. 2d 1, 16-17 (1994) (suggesting that exceptions to California Evidence Code §§ 956-958 are implied exceptions to the lawyer's professional duty of confidentiality in California Business and Professions Code § 6068(e)); *People v. Meredith*, 29 Cal. 3d 682, 694-95, 631 P.2d 46, 53-54, 175 Cal. Rptr. 612, 619-20 (1981) (holding that a lawyer must turn over physical evidence of crime to a prosecutor when the lawyer has removed or altered evidence even though doing so may disclose confidential client information).

7. See generally ALAS, *supra* note 2. These figures are compiled from the ALAS memorandum. *Id.* The District of Columbia is included in the ALAS memorandum data. *Id.*

fornia appears to require that the lawyer remain silent.<sup>8</sup> This proposed bill would permit a lawyer to disclose confidential information to prevent death or substantial bodily harm.<sup>9</sup>

## 2. Prospective or Ongoing Client Fraud

*A lawyer, retained by a client to assist in arranging and documenting a transaction with a third person, learns that the client has used or is using the lawyer's service to perpetrate a fraud on the third person.*

All states except California have professional rules dealing with client fraud: (a) *Prevention of criminal fraud by a client*: forty-one states require or permit the lawyer to disclose; nine jurisdictions do not.<sup>10</sup> (b) *Rectification of client fraud in which the lawyer's services have been used*: seventeen states require or permit the lawyer to disclose.<sup>11</sup> Yet, the California State Bar has opposed any professional rule that would permit or require disclosure or rectification of prospective or ongoing client fraud.<sup>12</sup> There is currently no such rule, and reliable authorities

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8. *Id.* at 140 n.6 (citing San Diego County Bar Assn. Op. 1990-1 (which states that a lawyer may not even disclose client confidential information when the client has "expressed an intention to kill or injure someone else"); see also Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1981-58, at 62 (holding that § 6068(e) forbids a lawyer to disclose an expert engineer's conclusion that a structure occupied by third parties may be unstable in an earthquake).

9. It can be argued that the 1993 legislative amendment to the lawyer-client privilege, contained in Evidence Code § 956.5, also modified the professional duty of confidentiality. See *infra* note 23 and accompanying text.

10. See ALAS, *supra* note 2, at 132-40.

11. See *id.*

12. *Id.* at 140 n.6. On two occasions the State Bar has proposed rules addressing confidentiality, first in 1987 and then again in 1992. Zacharias, *supra* note 3, at 372-73 & n.18. The 1992 proposal, Proposed Rule 3-100, *Duty to Maintain Confidence and Secrets Inviolable*, permitted disclosure of a confidence or secret on only two grounds: (1) consent of the client, or (2) "to prevent the commission of a criminal act that the member believes is imminently likely to result in death or substantial bodily injury." Proposed Rule 3-100 to Cal. Rules of Professional Conduct (1992), reprinted in Zacharias, *supra* note 3, at 372-73 & n.18. The 1987 proposal was identical, except that it also included a self-defense exception and permitted disclosure when ordered by a court. *Id.* at 373 & n.18. Neither proposed rule, if adopted, would have permitted or required disclosure to prevent or rectify a criminal fraud by the client which involved the use of the lawyer's services. *Id.*; see also Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1993-133, at 3-4 ("[The] attorney's duty to maintain client confidences and secrets inviolable is broader in scope than the [lawyer-client] privilege.").

state that California law does not permit any disclosure.<sup>13</sup> This bill permits a lawyer to disclose confidential information to prevent the client from committing a fraud, or to rectify the consequences of a client's criminal or fraudulent act in the commission of which the client used the lawyer's services. This proposed bill will discourage clients from using lawyers to commit fraud.

### 3. Criminal Fraud on a Tribunal

*A lawyer learns that a client intends to offer false evidence either personally or through an alibi witness.*

Current law everywhere requires the lawyer to remonstrate with the client and to refuse to offer the perjured testimony of a witness.<sup>14</sup> The professional rules of the vast majority of states require the lawyer to go further: The lawyer must counsel the client that if the client insists on testifying falsely, the lawyer must seek to withdraw and, if necessary, reveal the client's intended or past perjury to the tribunal.<sup>15</sup> Usually this advice results in the client either not taking the stand or testifying truthfully.<sup>16</sup> In California, a lawyer may not use a threat of disclosure to persuade a client not to testify falsely, because California law apparently does not permit the lawyer to disclose perjured testimony.<sup>17</sup> The

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13. See ALAS, *supra* note 2.

14. GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 373 (2d ed. 1994).

15. A California lawyer may not knowingly offer false evidence or suborn perjury, but no California rule or statute parallels the professional rules of 38 states, which require a lawyer to reveal client confidential information to rectify a prior or contemporaneous commission of perjury or other fraud on a tribunal. See ALAS, *supra* note 2. The professional rules of three states clearly prohibit such disclosure. *Id.* at 139 n.4. Nine others retain versions of ABA Model Code of Professional Responsibility DR 7-102(B)(1), which may be interpreted either to require or prohibit disclosure, depending upon whether the jurisdiction adopted a 1974 ABA amendment and follows the interpretation of the 1974 amendment stated in ABA Committee on Ethics and Professional Responsibility, Formal Opinion 341. *Id.*

16. See HAZARD, *supra* note 14, at 374-75 (citing ABA Committee on Professional Ethics Formal Opinion 353 (1987)).

17. See *People v. Guzman*, 45 Cal. 3d 915, 942-46, 755 P.2d 917, 932-35, 248 Cal. Rptr. 467, 482-85 (1988) (holding that use of the "narrative approach" by a criminal defense lawyer does not constitute ineffective assistance of counsel); *People v. Brown*, 203 Cal. App. 3d 1335, 1338-40, 250 Cal. Rptr. 762, 763-65 (1988) (holding that a California lawyer, knowing that a client plans to give false testimony, must seek to withdraw if efforts to persuade the client to testify truthfully are unsuccessful, and holding that the trial judge has broad discretion to deny the withdrawal request, as happened in this case). Cf. *Nix v. Whiteside*, 475 U.S. 157, 171 (1986) (finding that a criminal defendant's right to effective assistance of counsel is not violated when the defense lawyer persuades the client to testify truthfully by threatening disclosure if the client testifies falsely).

threat would be a false one that the lawyer cannot make. This proposed bill requires a lawyer to disclose confidential information to rectify prior false testimony or evidence offered by a lawyer in an adjudicatory proceeding (fraud on the tribunal). The proposed legislation, by discouraging the use of false evidence, protects the integrity of judicial proceedings and furthers public acceptance of their judgments.

#### 4. Lawyer Self-Defense

*A client sues a lawyer for malpractice, the state's disciplinary body charges the lawyer with a grievance for conduct in representing a client, or the lawyer seeks to collect a reasonable fee from a client who has unjustifiably refused to pay.*

Every state except California has a confidentiality rule that permits the lawyer to disclose client information to the extent necessary to protect the lawyer's reputational, professional, and economic interests.<sup>18</sup> Due process clearly requires that the lawyer be able to disclose client confidences as a defense to legal liability or professional disci-

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18. If there were no implied exceptions to California's Business and Professions Code § 6068(e), a lawyer could not plead and prove a claim that a client failed to pay for services rendered. Without the client's consent, the lawyer's duty of confidentiality prohibits proof of facts concerning the services rendered. The same is true of an action in which a third person sues the lawyer for actions growing out of the lawyer's representation of a client. Without the client's consent, the lawyer could not volunteer testimony or documents that would provide the lawyer a defense. When the client files a malpractice action against a lawyer, however, the forensic doctrine of fairness would permit the lawyer to establish a defense: The client waives the attorney-client privilege by putting it in issue. See HAZARD, *supra* note 14, at 285. But exceptions to the testimonial privilege are not be invoked when the lawyer is the claimant, or the client is not a party. In those situations, it is the lawyer who takes the initiative to disclose client confidential information to protect the lawyer's own interests. In passing on claims by and against lawyers, courts in California tacitly recognize an implied exception to the professional duty of confidentiality. See Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 875 (9th Cir. 1979) (finding that a law firm was entitled to recover a one million dollar contingent fee from a corporate client for filing a certiorari petition because the fee was not "unconscionable" under applicable California law); see also L.A. County Bar Ass'n, Formal Op. 396 (1982) (recognizing an implied exception to confidentiality for lawyer self-defense). The legislature should specifically recognize the lawyer self-defense exception by statute. It is wrong and anomalous, however, to sacrifice client confidentiality when a lawyer's economic interests are at stake, but not when the economic interests of third persons are involved, as in client fraud situations.

pline.<sup>19</sup> This bill permits a lawyer to disclose confidential information when reasonably necessary in self-defense or to collect a just fee.

### B. *The Attorney-Client Privilege*

The professional duty of confidentiality must be contrasted with the attorney-client privilege, which comes into play only when a tribunal with powers of compulsory process seeks to compel a lawyer or a client to testify or provide documents disclosing client communications made to a lawyer for the purpose of obtaining legal advice.<sup>20</sup> Evidence Code sections, beginning with section 952, deal in detail with the lawyer-client privilege in California.<sup>21</sup> These sections give large protection to the personal and social interests that support confidentiality in the lawyer-client relationship, but contain a number of sound exceptions for situations in which other interests outweigh those of client confidentiality.<sup>22</sup> These important departures from confidentiality include: (a) the crime-fraud exception,<sup>23</sup> (b) the death or bodily injury exception,<sup>24</sup> (c) the deceased client exception,<sup>25</sup> (d) the exception when a

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19. See HAZARD, *supra* note 14, at 285.

20. CAL. EVID. CODE § 955 (West Supp. 1995); HAZARD, *supra* note 14, at 220. For a discussion of the attorney-client privilege and the separate professional duty of confidentiality, see *id.* at 220-349 (discussing and contrasting both doctrines); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 242-311 (1986) (same).

21. CAL. EVID. CODE §§ 952-962 (West Supp. 1995).

22. See *id.*

23. CAL. EVID. CODE § 956 (West Supp. 1995) ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.").

24. CAL. EVID. CODE § 956.5 (West Supp. 1995) ("There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.").

Evidence Code § 956.5 was adopted in 1993 after the Supreme Court declined to adopt proposed Rule 3-200. See Zacharias, *supra* note 3, at 372-73 & n.18. Section 956.5 amends the statutory lawyer-client privilege to deny the privilege in the same situations that the State Bar's proposed confidential rule would have permitted voluntary disclosure by a lawyer. See *id.* The problem is that the statutory lawyer-client privilege only protects client confidential communications when a tribunal with compulsory process seeks to force a lawyer or client to disclose privileged information. An exception to the privilege merely means that a court may compel testimony over an objection based on the privilege. The testimonial privilege also covers a narrower category of information: The privilege covers only communications between a lawyer and a client for purposes of legal advice. The professional duty of confidentiality, on the other hand, covers all information acquired by a lawyer during the course of or relating to the representation. Since the longstanding crime-fraud exception of § 956 denied the privilege to client communications made for the purposes of *any* crime or fraud, communications involving the criminal acts dealt with in the 1993 amendment

client breaches a duty to a lawyer,<sup>26</sup> and (e) the joint client exception.<sup>27</sup>

### *C. Purposes of the Proposed Bill*

The purpose of the following bill is to clarify the confidentiality duties of lawyers in situations not governed by the attorney-client privilege, that is, situations other than when a tribunal with compulsory process seeks to compel a lawyer's testimony. The California Evidence Code provides ample and satisfactory scope for confidentiality of client communications made for the purpose of obtaining legal advice. In doing so, California accords with evidence law generally, in recognizing a number of limited exceptions for confidentiality: to prevent the death or substantial bodily injury of a person; to prevent client crime or fraud; to prevent the crime of client or witness perjury; to permit the lawyer to defend himself or herself when charged with wrongdoing by the client or a third person; and to protect the lawyer's economic interest in collecting a just fee from a client. Similar exceptions are needed for the broader category of information protected by the professional duty of confidentiality.

In other states, as previously mentioned, the lawyer's professional duty of confidentiality is dealt with in a professional rule adopted by

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were already denied protection of the privilege. Thus, the amendment accomplished nothing in terms of the lawyer-client privilege. Was the amendment, which used language drawn from the State Bar's rejected proposal on the duty of confidentiality, intended as an exception to California's Business and Professions Code § 6068(e)? Or did it have other purposes? Professor Zacharias struggles with these difficult questions in a recent article. *See Zacharias, supra* note 3, at 374-78 (arguing that the meaning of the amendment is unclear and that California law of confidentiality is confused, chaotic, and in need of clarification).

25. CAL. EVID. CODE § 957 (West Supp. 1995) ("There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.").

26. CAL. EVID. CODE § 958 (West Supp. 1995) ("There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.").

27. CAL. EVID. CODE § 962 (West Supp. 1995) ("Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).").



the highest court of the jurisdiction. This subject is sometimes thought to be within the exclusive province of the judiciary, which has broad rulemaking and decisional authority with respect to the conduct of lawyers in judicial proceedings. In California, however, the source of both the lawyer-client privilege and the professional duty of confidentiality has been legislative enactment. In 1988, when the supreme court returned the State Bar's first proposed confidentiality rule for further consideration by the Bar, the court inquired about the relationship of the rule to the statutory lawyer-client privilege.<sup>28</sup> More recently, the court's opinion in *General Dynamics Corp. v. Superior Court*<sup>29</sup> states that the permissive disclosure provisions of either a statute or ethical rule, "such as the statutory exceptions to the attorney-client privilege codified in the Evidence Code,"<sup>30</sup> may permit a discharged lawyer employed by a corporation "to depart from the usual requirement of confidentiality with respect to the client-employer" and establish a claim for wrongful discharge violative of public policy.<sup>31</sup> The *General Dynamics* opinion suggests that the exceptions to the statutory lawyer-client privi-

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28. In June 1988 the Court returned the proposal to the Bar and questioned its relationship to the statutory lawyer-client privilege:

[I]n what context does [the proposed rule] allow for disclosure of otherwise privileged information? To the extent it permits disclosure in a judicial proceeding where no statutory exception to the privilege exists, it may be inconsistent with, or contravene the legislature's intent underlying Evidence Code section 950 et seq. . . . Where the legislature has codified, and revised, or supplanted privileges previously available at common law, does the court have inherent authority to modify this statutory privilege?

Letter from the supreme court to President of State Bar (June 23, 1992) (quoted in *Request that the Supreme Court of California Approve Proposed Rule 3-100 of the Rules of the Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation, Recommendation*, CAL. LAW., Nov. 1992, at 3).

29. 7 Cal. 4th 1164, 876 P.2d 487, 32 Cal. Rptr. 2d 1 (1994). In *General Dynamics*, the court held that a lawyer employed as corporate house counsel had a tort remedy for retaliatory discharge in violation of public policy if two conditions were satisfied: (1) the circumstances would support such a claim by a discharged non-lawyer employee; and (2) the claim could be established without violating the lawyer's confidentiality obligations. *Id.* at 1189, 876 P.2d at 503, 32 Cal. Rptr. 2d at 17. The latter requirement could be met by showing that "some statute or ethical rule, such as the statutory exceptions to the attorney-client privilege codified in the Evidence Code, specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the 'nonfiduciary' conduct for which he was terminated." *Id.* (citation omitted); see CAL. EVID. CODE §§ 956-958 (West Supp. 1995).

30. *General Dynamics*, 7 Cal. 4th at 1189, 876 P.2d at 503, 32 Cal. Rptr. 2d at 17 (citation omitted); see also CAL. EVID. CODE §§ 956-958 (West Supp. 1995).

31. *General Dynamics*, 7 Cal. 4th at 1189, 876 P.2d at 503, 32 Cal. Rptr. 2d at 17.

lege now operate as implied exceptions to the confidentiality statute.<sup>32</sup> If so, a California lawyer can now disclose client confidences without client consent, even when no testimonial compulsion is involved, in all the situations in which Evidence Code sections 956 - 962 deny the privilege.

In any event, Business and Professions Code section 6068(e) should be amended, whether to conform to the reality suggested by the *General Dynamics* case or to remedy the current state of uncertainty concerning a lawyer's confidentiality obligations. Otherwise, lawyers and the public will be misled by the text of section 6068(e), which states no exceptions to the lawyer's duty of confidentiality.<sup>33</sup> The history of the treatment of lawyer confidentiality in California by both the Legislature and the California Supreme Court provides strong support for legislative correction of the current morass. The legislation proposed here does not contravene the rulemaking authority of the California Supreme Court concerning regulation of the legal profession, but has been invited by prior legislative involvement and the Court's own posture.

The proposed bill remedies the paucity of California law concerning a lawyer's professional duty of confidentiality, creates exceptions to the confidentiality rule when more important interests are at stake, brings the law of California into accord with that of other states, and eliminates the current tension between the California law of privilege and the professional duty of confidentiality.<sup>34</sup> The proposed legislation is in the public interest and should be promptly adopted.

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32. *See id.*

33. *See* CAL. BUS. & PROF. CODE § 6068(e) (West Supp. 1995).

34. Under the Evidence Code, a California lawyer must disclose privileged information when called before a tribunal in circumstances in which the public interest in disclosure outweighs interests in lawyer-client secrecy. *See supra* notes 20-26 and accompanying text. The current law, however, prevents the lawyer from making a disclosure in order to prevent the same harms protected by the universally recognized exceptions to the statutory lawyer-client privilege. *See* CAL. BUS. & PROF. CODE § 6068(e) (West Supp. 1995). This is so even though much of the information protected by the duty of confidentiality does not involve communications made between lawyer and client for purposes of obtaining legal advice. Thus, this information, not protected by the attorney-client privilege in a court proceeding, receives greater protection under the duty of confidentiality, a paradoxical result.

## II. PROPOSED STATUTE AMENDING CALIFORNIA PROFESSIONAL DUTY OF CONFIDENTIALITY

California Business and Professions Code, chapter 4, article 4, section 6068(e) is hereby amended to read as follows:

[It is the duty of an attorney:]

(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client in accordance with the professional duty of confidentiality.

(1) *Definitions.* As used in this section, "confidential information" includes both a "confidence" and "secrets." "Confidence" means information as defined in Evidence Code section 952 and "secrets" means all information relating to a client acquired by the lawyer during the course of or by reason of the representation, other than information protected by section 952.

(2) *Duty.* Except as permitted by paragraph (3) or as required by paragraph (4), a lawyer shall not:

(A) Reveal confidential information of a client or a former client.

(B) Use confidential information of a client to the disadvantage of a client or former client unless the client consents after consultation or the information has become generally known.

(3) *Permissive disclosure.* A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:

(A) When the client consents after consultation;

(B) When the law expressly or impliedly authorizes the lawyer to do so in order to carry out the representation.

(C) To comply with a court order, a California Rule of Professional Conduct, or other law.

(D) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, in wrongful detention or incarceration of a person, or in substantial injury to the financial interests or property of another.

(E) To rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used.

(F) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(4) *False evidence.* When a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts. This duty continues until remedial legal measures are no longer reasonably possible.

### III. EXPLANATORY COMMENTS ON PROPOSED CONFIDENTIALITY BILL

#### A. *Confidentiality Generally*

1. The general principle that a lawyer should keep client information in confidence is stated in California Business and Professions Code section 6068(e). Both the fiduciary relationship existing between lawyer and client and proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek legal assistance.

2. Subject to the permissive disclosure provisions of paragraph (3) and the mandatory disclosure requirement of paragraph (4), the lawyer generally should be required to maintain confidentiality of information acquired by the lawyer during the course of or by reason of the representation of the client. This principle involves a fiduciary obligation, originating in the law of agency, not to use the information to the detriment of the client.

3. This principle of confidentiality is given effect not only in this statute, but also in the law of evidence regarding the lawyer-client privilege, and in the law of agency. The lawyer-client privilege, developed over many decades, provides the client a right to prevent certain confidential communications from being revealed by compulsion of law. The professional duty of confidentiality, as stated in this section, reinforces the principles of evidence law relating to the lawyer-client privilege. Communications protected by the lawyer-client privilege are defined in section 952 of the California Evidence Code (subject to the exceptions contained in sections 956 - 962).

4. Paragraph (1) of this section defines the information protected by the lawyer's professional duty of confidentiality. Paragraph (2) states the lawyer's duty not to reveal confidential information. Privileged communications are referred to as "confidences" in former Business & Professions Code section 6068(e) and in this revised section. Unprivileged items of information not protected by the lawyer-client privilege are referred to as "secrets." The section defines "confidential information" as including both privileged information (the "confidences" protected by the lawyer-client privilege) and "secrets" (other information the lawyer acquires in

the course of representation). In giving protection to both categories of information, paragraphs (1) and (2) are in accord with general fiduciary principles of agency law and with the law of other states. Because the lawyer's professional duty of confidentiality extends to both categories of information, for most purposes nothing should turn on whether one category of information or the other is involved. Unprivileged information (client "secrets"), however, is generally entitled to less protection against disclosure than that given by the Evidence Code to privileged information (client "confidences"). Communications made by a client to a lawyer for purposes of obtaining legal advice serve public as well as private purposes: The client's candor in seeking legal advice leads to sound advice and sound advocacy, which in turn furthers law observance and good judicial administration. If the Evidence Code withdraws protection from compelled disclosure of information that otherwise would be a client "confidence," there is even less reason to protect unprivileged information a lawyer acquires during the course of the representation.

5. The requirement of confidentiality applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

#### *B. Disclosure for Benefit of Client*

6. The law may impliedly authorize a lawyer to make disclosures to carry out the representation, and the lawyer is generally recognized as having implied-in-fact authority to make disclosures about a client when appropriate in carrying out the representation to the extent that the client's instructions do not limit that authority. Subparagraphs (3)(A) and (B) codify these principles. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion. Unless the client has instructed that particular information be confined to specified lawyers, the lawyer's implied authority also includes sharing client information with other lawyers in the same firm and with firm employees and agents whose assistance is necessary to carry out the representation. Subparagraph (3)(B) continues these long-standing practices concerning disclosure of confidential information within a firm.

7. The effect of the duty stated by paragraph (2) is to require the lawyer to invoke, for the client, the lawyer-client privilege when the lawyer believes it is applicable; but if the court denies the privilege, under subparagraph (3)(C), the lawyer may testify as ordered by the court or may test the ruling by seeking reconsideration or appellate review.

*C. Use of Information*

8. Following sound principles of agency law, subparagraph (2)(B) subjects a lawyer to discipline for using information relating to the representation in a manner disadvantageous to the client, absent the informed consent of the client. Because a conflict with the lawyer's own interests may be involved, the lawyer should consult California Rules of Professional Conduct (CRPC) 3-310, which requires that notice of the conflicting interest to the client and the client's informed consent be in writing. This duty not to misuse client information continues after termination of the client-lawyer relationship. Therefore, a lawyer is forbidden by subparagraph (2)(B) to use, in absence of the client's informed consent, confidential information of the former client to the client's disadvantage, unless the information is generally known.

*D. Discretionary Disclosure Adverse to Client*

9. In becoming privy to information about a client, a lawyer may foresee that the client intends to cause serious and perhaps irreparable harm to another. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's information—usually unprivileged information—even though the client's purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is required or permitted to disclose a client's wrongful purposes may be inhibited from revealing facts that would enable the lawyer to counsel effectively against wrongful action. The law must balance the adverse effects on legal representation against the harm that will be suffered by victims of the client's actions, the adverse effects on the integrity of proceedings, and the danger that the public will lose confidence in legal institutions that prefer secrecy to truthful outcomes. Subparagraphs (3)(D) and (E) follow the policies embodied in California Evidence Code sections 956 and 956.5, and therefore permit disclosure in these relatively rare situations.

10. Evidence Code section 956 follows the underlying public policy of furnishing no protection to client information where the client seeks or uses the services of the lawyer to aid in the commission of a crime or fraud. The same public policy governs the permission provided in subparagraphs (3)(D) and (E) and the mandate of paragraph (4). Where the client is planning or engaging in criminal or fraudulent conduct, or where the culpability of the lawyer's conduct is involved, full protection of client information is not justified.

11. Several other situations must be distinguished. First, the lawyer may not "advise the violation of any law, rule, or ruling of a tribunal unless the [lawyer] believes in good faith that such law, rule, or ruling is invalid." CRPC 3-210. It is also the duty of a lawyer to "counsel or maintain such actions, proceedings or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." CAL. BUS. & PROF. CODE § 6068(c) (West Supp. 1995). Compliance with the law may sometimes require a lawyer to reveal confidential information, such as when a court orders the lawyer to do so. Subparagraph (3)(C) permits a lawyer to disclose confidential information in order to comply with a court order or other law. Situations may also arise where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct, and subparagraph (3)(D) permits such disclosures. A lawyer's duty to prevent the use of false or fabricated evidence is a special instance of the duty, prescribed in section 6068(c) and CRPC 3-210, to avoid advising or assisting the violation of any law. Subparagraph (3)(C) permits revealing information necessary to comply with CRPC 3-210, and paragraph (4) requires disclosure in some situations involving false evidence.

12. Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation, the lawyer has not violated CRPC 3-210 because "advising" or "assisting" criminal or fraudulent conduct requires knowing that the conduct is of that character. Since the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable. Subparagraph (3)(E) gives the lawyer professional discretion to reveal both unprivileged and privileged information to serve those interests. In view of California Evidence Code sections 956 and 956.5, however, such information will rarely be privileged.

13. Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. The lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the social interest in preventing the harm and the lawyer's interest in not being used as an instrument of crime or fraud may be more compelling than the interest in preserving confidentiality of information. As stated in subparagraph (3)(D), the lawyer has professional discretion, based on a reasonable belief that the facts warrant it, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. *See* paragraph (4) and Comments 17-20.

14. The lawyer's exercise of discretion under subparagraphs (3)(D) and (E) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by subparagraphs (3)(D) and (E), failure to take preventive action does not violate those provisions. *But see* paragraph (4). This section does not define standards of civil liability for lawyers for professional conduct, a matter left to judicial precedent and development.

15. Sub-paragraph (3)(F) recognizes the necessity of allowing a lawyer to prove the services rendered in an action to collect a fee. This aspect of the rule, in regard to privileged information, expresses the principle that the beneficiary of a fiduciary relationship may not exploit the relationship to the detriment of the fiduciary. *See* CAL. EVID. CODE § 958 (West 1966 & Supp. 1995) (allowing no lawyer-client privilege "as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship"). Any disclosure by the lawyer, however, should be as protective of the client's interests as possible.

16. If the client is an organization, a lawyer also should refer to CRPC 3-600 and its commentary to determine the appropriate conduct in connection with this statute.

*E. Mandatory Disclosure Adverse to Client to Rectify False Evidence*

17. Paragraph (4) places upon a lawyer professional obligations in certain situations to make disclosures in order to rectify a fraud on a tribunal. When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. *See* CRPC 5-200(A) (requiring that lawyers employ "such means only as are consistent with truth"). Criminal laws also prohibit the use of false evidence. When false evidence is offered by the client, a conflict arises between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the



persuasion is ineffective, the lawyer must take reasonable remedial measures so long as doing so is practicable. *See* CRPC 3-210.

18. Fraud on a tribunal is an important special instance of the principle that a lawyer cannot offer false evidence. *See* CRPC 5-200(A); CAL. EVID. CODE § 565 (West Supp. 1995). In the case of criminal fraud on a tribunal, unlike those situations of fraud on a third person governed by the permissive disclosure authority of subparagraphs (3)(D) and (E), the lawyer has a duty to take reasonable remedial steps if the client refuses to rectify the fraud. The public interest in the integrity of judicial proceedings is a more important interest than that of private economic harm. Consequently, a lawyer should be required rather than merely permitted to rectify fraud on a tribunal.

19. If perjured testimony or false evidence has been unknowingly offered by a lawyer, the lawyer's proper course ordinarily is to remonstrate with the client privately. If that fails, the lawyer should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the lawyer should make disclosure to the court. It is then for the court to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of the communication when the lawyer discloses the information to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client and a mistrial may be unavoidable.

20. Because it is very difficult for a lawyer to know when a client intends to or has offered false evidence, the lawyer is required by paragraph (4) to act only if the lawyer has information that produces a firm conviction that material false evidence will or has been offered. Although a violation of paragraph (4) will subject a lawyer to disciplinary action, the lawyer's decisions whether or how to act should not constitute grounds for discipline unless the lawyer's conduct in the light of those decisions was unreasonable under all existing circumstances as they reasonably appeared to the lawyer at the time.

#### *F. Withdrawal*

21. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw. *See* CRPC 3-700(B). After withdrawal, a lawyer's conduct continues to be governed by this section. The lawyer's duties of disclosure under paragraph (4) continue until reasonable remedial measures are no longer reasonably possible. This statute does not prevent the lawyer from giving notice of the fact of withdrawal, nor does it forbid the lawyer from withdrawing or disaffirming any opinion, document, affirmation, or the like.

*G. Other Rules of Law*

22. Various other rules of law may permit or require a lawyer to disclose information relating to the representation. *See, e.g.*, CAL. EVID. CODE §§ 956-962 (West 1966 & Supp. 1995) (dealing with disclosure of privileged information when ordered by a court). In addition to those provisions, a lawyer may be obligated by other provisions of statutes or other law to reveal information about a client. Whether another provision of law supersedes the provisions of this section is a matter of interpretation left to the courts, but subparagraph (3)(C) protects from discipline a lawyer who acts on a reasonable belief as to the effect of such laws.

